Osberg v. Foot Locker, Inc., et al., 07-cv-01358 (KBF) (S.D.N.Y.)

Joint Pretrial Order

July 1, 2015

Exhibit 11E

Declaration of Russell Howard

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEOFFREY OSBERG **On behalf of himself and on behalf of all others similarly situated,** **Plaintiff,** **- against -** **FOOT LOCKER, INC.,** **FOOT LOCKER RETIREMENT PLAN,** **Defendants.**	**Case No.: 07 CV 1358 (KBF)**

DECLARATION OF RUSSELL HOWARD

I, Russell Howard, declare under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. My name is Russell Howard. I live in Leonardo, New Jersey. I worked for Foot Locker/Woolworth/Kinney Shoes from September 1, 1967 until May 2003. Much of that time was spent working in company headquarters in New York – first in the Woolworth building and later on 33rd Street. I resigned from Foot Locker at age 55 for a better opportunity at another company. I received a lump sum from the Foot Locker pension plan when I left in 2003.

2. I am taking time off of work in order to testify at trial for myself and on behalf of my former co-workers and others who worked for Foot Locker because I believe that what the company did to its employees here was wrong. I did not learn until recently that I had not earned any additional pension benefits after the Plan was changed on January 1, 1996, and discovered this fact only through having received a notice in the mail notifying me of that.

3. Based on the communications discussed below and others that I received from Foot Locker, I mistakenly believed that my pension was growing the entire time I worked for the

company. The way that Foot Locker described the Plan changes in 1995-1996, I believed that Foot Locker had converted the benefit that I had earned up through December 31, 1995 into an opening account balance and that for each year that I continued working after January 1, 1996, Foot Locker added compensation credits and interest credits to my new account so that the account grew each year. I understood that the opening account was my pension benefit and that growth in my account equated to growth in my pension. I did not know that the credits made to my account after January 1, 1996 were not included in the lump sum payment that I received in 2003 because Foot Locker did not inform me of that fact. I never had any reason to think that the full value of my December 31, 1995 accrued benefit was not reflected in my opening account balance. I considered the company to be like family and never had any suspicion at any time that the company would attempt to pull something over on me.

4. During my employment with Foot Locker, I read all communications I received from the company about the retirement plan to get the gist of what they were saying. Based on my reading of those materials, I understood that the pension plan Foot Locker offered was an annuity that would be paid out starting when I retired at age 65. My hope and expectation throughout my tenure at Foot Locker was that I would stay with the company until I retired, so when receiving and reviewing pension plan-related materials, I did not give any thought to receiving benefits at an age earlier than 65. My understanding was that as I worked for the company, I earned pension benefits under a percentage formula based on my annual compensation. Before the Plan changes in 1996, I received statements showing my pension growing from the previous year. One was a retirement plan statement that reported only my pension benefit, directly showing me how much my annuity benefit had increased over the previous year. I had examined these types of statements closely at the time to get a sense of how

much my pension was growing and what I could expect to receive as an annuity when I ultimately retired from the company. The other type of statement I received showed me all the benefits that Woolworth provided, how much those benefits cost Woolworth, and the current amount of my retirement benefit.

5. After the announcement of the plan change in late 1995, Foot Locker continued to send me statements that remained very similar in form and content, showing me my new account balance, how much my account had grown from the previous year, and the cost to Foot Locker of providing these benefits. I understood at the time that the pension benefit I had was growing each year and that my account accruals each year "cost" the company real dollars to provide those benefits.

6. I first learned about Foot Locker changing the plan through a September 1995 letter from the CEO and President of Woolworth Corporation. That document is trial exhibit PX2. The next communication about the Plan changes I received came later in Fall 1995 from the benefits department. That document is trial exhibit PX4. The memo told me that the company would be taking the monthly benefit I had already earned and converting it into a cash balance account. I understood that the account was benefit and that I would be able to see my benefit grow year-after-year by watching my account grow, until I ultimately retired.

7. I remember continuing to receive plan statements in 1996 and thereafter. The initial 1996 plan statement showed me how much Foot Locker put in my cash balance account. That statement showed my prior monthly benefit on the left side and the new account on the right side, so it looked to me like the money I had previously earned was being deposited in my account to start. The statement said that the account balance was the amount I would receive if I terminated employment or retired. I took that as confirming that the account was equal to benefit

I had earned under the old plan through the end of 1995. I also received annual benefit statements that showed all of the other benefits I was receiving and how much they cost the company. My understanding when receiving each of these statements was that my benefit was continuing to grow each year in and after 1996.

8. I received a summary plan description afterwards that I remember reading through to get the gist of how the new Plan worked. I understood that the company had opened an account for me in 1996 and put into it the the full value of the annuity I had earned through the end of 1995. I trusted the company as my employer to honestly describe what was happening to my pension benefit. I didn't read anything in that document that indicated or signaled to me that my benefit would be frozen or might be frozen.

9. I don't recall there being any HR-led meetings at the Woolworth offices or anywhere else about the pension plan in 1995-1996. I and the hundreds of other employees who worked in the Woolworth building got our understanding of what was going on from the written materials we were sent. Although some of the documents told me that I could call Human Resources about any questions I had about the pension plan, nothing was said in a negative way that made me think I had anything to be concerned about, so I had no reason to call. No one in the office as far as I can recall expressed any concern with the changes to the pension plan.

10. When I left Foot Locker in 2003, I received a letter that showed all of my personal information and provided some optional forms of payment as of June 1, 2003. That document is Trial Exhibit PX71. The form said that "[b]ased on the information shown above" – including the fact that my "Account Balance as of Benefit Payment Commencement Date" of $112,312.10 – my "Lump Sum (payable June 01, 2003)" was $166,457.69. From reading that document, I assumed that some sort of required pension calculation was done to my account

balance to arrive at the lump sum amount. I sent the paperwork to my financial advisor at the time for review. The fact that the lump sum amount was larger than the account balance did not signal to me or to my financial advisor that my benefit was frozen for a period of 7+ years. We believed that the lump sum had been correctly calculated using my account balance and made the decision that I should take my benefit in that lump sum form.

11. I'm offended that Foot Locker could point to the document I received in 2003 and say that it was a tip-off that my benefit had been frozen. I'm honestly not sure how I could have deduced that my benefit had been frozen based on the information the company gave me. I still don't completely understand how Foot Locker managed to freeze my pension. The payment I received looked like I was getting my account balance, including all the growth since 1996, plus even more. It makes no sense to me why Foot Locker would open an account for me, or send me annual "benefit statements" showing the account growing if all that growth was meaningless. It seems obvious the company was trying to trick me and everyone else.

12. I do believe that I, and others like me, should receive the pension growth promised me we would receive in exchange for our work in 1996 and later based on the communications that the company sent us. Based on what my attorneys tell me, I understand that even if I had worked through age 65 – March 1, 2013 – I still would not have earned a single penny of new pension benefits after 1995. I'm sure that there must have been other company employees who suffered that fate unknowingly, working more than 15 years for the company without earning any new benefits. That does not seem fair.

13. Foot Locker never informed me that I would not earn any more pension benefits after the Plan was changed on January 1, 1996, or even that there was a risk that I might earn nothing more for any period of time. Foot Locker certainly never told me that I would not earn

any new pension benefits from January 1, 1996 until I left in May 2003, over 7 years later. Foot Locker also did not inform me when they paid my lump sum that the amount I received did not include any of the compensation and interest credits that I thought they had added to my account and pension benefit when I watched it grow over the years. I also understand from my attorneys that the pension freeze amounted to something along the lines of a 15% pay cut throughout the 1996-2003 period.

14. Had I been informed that the actual method used to calculate my initial account balance gave me less than half the value of my pre-1996 annuity benefit, that my pension benefit would or might be frozen, and/or that my ultimate benefit paid would be calculated without including the credits added to my account after January 1, 1996, I would have been very upset. Knowing the other employees in the Woolworth building at the time, I believe others would also have responded negatively. I and others knew some of the higher-ups in HR-benefits and senior management and would have voiced our displeasure, especially if we had known that new hires coming in off the street to work for the company would be earning new benefits while we long-time employees were being subjected to a pension freeze. Notwithstanding the financial struggles of the company overall at the time, it was obvious to me and others that the company would be fine after reducing its exposure to some of the underperforming divisions like F. W. Woolworth. There were many employees who were not fearful of their job at the time who I'm sure would have complained or objected had the true plan changes been accurately communicated to us rather than the communications described above which gave us the impression that our benefits were growing.

Dated: July 1, 2015

Russell Howard

Russell Howard